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No. 433.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

CHAMPLIN REFINING COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF FOR THE CHAMPLIN REFINING COMPANY

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OPINION BELOW

The opinion below with dissent, (R. 32-41) is not yet reported.

JURISDICTION

Jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b) and 2325.

QUESTIONS PRESENTED

In the prior Valuation Case (*Champlin Refining Company* v. *United States*, 329 U. S. 29) this Court held that the Interstate Commerce Act supported an order of the Interstate Commerce Commission requiring Champlin to file valuation reports. It was said in the opinion that Champlin's contention that the order violated the Fifth Amendment by imposing upon a private carrier the burdens of a common carrier was premature in that the mere making of valuation reports did not constitute a taking of property.

The opinion stated that the decision in the Valuation Case "affords no * * * implication" that this Court would uphold an order which, "converts a private pipe line into a public utility and requires a private carrier to become a common carrier".

The opinion stated further that if the Commission should ever attempt so to do, this Court would be open to hear Champlin's complaint.

The Commission is now attempting to compel Champlin to file tariffs, and to file the annual reports and institute the uniform accounts required of common carriers under the Act, which in Appellee's belief would constitute a commitment upon its part to carry all oil offered it. What this Court described as premonitions have now become actualities.

However, the constitutional question is not the only question involved in the present action. Since the trial of the Valuation Case, Champlin's pipe line operations have been altered in material respects, by reason of which the legal basis for the Court's holding in the prior case has been eliminated in this case.

We, therefore, present to this Court the following questions:

(1) whether appellee is estopped by the judgment in the Valuation Case to challenge the validity of the order involved in this case;

(2) whether the order complained of takes Champlin's property without due process of law in violation of the Fifth Amendment to the Constitution;

and

(3) whether Champlin is subject to the requirements of Sections 6 and 20 of the Interstate Commerce Act.

The related incidental questions will be considered in their order as they arise.

STATUTES INVOLVED

Section 1 of the Act to Regulate Commerce (24 Stat. 379), February 4, 1887; Section 1 of the Hepburn Amendment (34 Stat. 584), June 29, 1906; Section 1 of the 1920 Amendment to the Interstate Commerce Act (41 Stat. 474-478), February 28, 1920, are the pertinent statutes. They are printed in Appendix "A". (69-76)

STATEMENT OF THE CASE

This suit, brought by Champlin Refining Company against the United States to set aside the latest of two orders made by the Interstate Commerce Commission in furtherance of its program to compel Appellee to operate its pipe line as a common carrier, is the second suit filed by Appellee in resisting the program of the Commission and in an effort to protect its private use of its products pipe line.

The first order promulgated by the Commission purported to require Appellee to prepare and file with the Interstate Commerce Commission an inventory, schedules, maps and charts of its pipe line. Appellee brought suit to prevent the enforcement of that order. The case was determined by a three-judge court (*Champlin Refining Company* v. *United States*, 59 Fed. Supp. 978). The case was argued before this Court November 8, 9, 1945; re-argued October 18, 21, 1946; and decided November 18, 1946

(*Champlin Refining Company* v. *United States et al.*, 329 U. S. 29).

Thereafter, Counsel for the Champlin Refining Company, received a letter from the Department of Justice dated May 23, 1947, (Appendix "B") making inquiry as to whether schedules of rates had been filed with the Interstate Commerce Commission by the Champlin Company and if not as to whether Champlin would care to state the reasons, if any, why such schedules have not been filed, and making reference to possible penalties by citing Section 1 of the Elkins Act (49 U. S. C. 41).

Further proceedings were had before the Commission, which were followed by the order complained of in this suit.

The order of the Commission purports to require Champlin:

(a) to file tariffs as required by Section 6 of the Interstate Commerce Act;

(b) to file annual and other reports as required by Section 20 of the Act;

and

(c) to adopt the system of accounts prescribed by the Commission under Section 20 of the Act.

In the present proceeding, the Department of Justice continues its position in the former Valuation Case, to wit, that the Champlin products pipe line is a "common carrier" for all purposes, under the Interstate Commerce Act.

Appellant's fact statement is substantially correct, except that appellee deems it proper to add certain material facts disclosed by appellee's evidence in these proceedings.

NATURE OF CHAMPLIN'S OPERATIONS

(1) Champlin's products pipe line is a private means of transportation

The Commission and the Three Judge Court agree that the pipe line in question is now and always has been used by Champlin for the exclusive purpose of transporting its own products, from its own refinery, to its own storage tanks.

The finding in this connection, by the Commission, is as follows:

> "Summarizing these matters as of the date of the hearing, it appears that the Champlin is the sole owner of the products transported through its pipe line; it has never transported any products belonging to any other company; its pipe line has no connection with any other pipe line; there is no point at which any petroleum product can be put into the line other than at the Enid refinery; delivery of the products at the three terminal points is made from the storage tanks by means of truck racks or railroad tank-car racks and is not delivered directly from the pipe line in any instance; no tariffs have been filed with this Commission or with any State Commission or regulatory body; and the right of eminent domain has never been assumed or exercised by the Champlin in connection with this pipe line." (R. 142, 143)

The Three Judge Court made the following additional finding:

> "Champlin could not transport the petroleum products of others without constructing facilities for receiving such products into its line and without constructing terminal facilities for delivering such products at the end of their transportation." (R. 32)

The Commission has conceded (61st Annual Report, p. 88), and indeed the Supreme Court found in the Valuation Case, that the Champlin line is not a common carrier under the common law test.

The facts as quoted under this sub-head are used to show that the Champlin operations are clearly distinguishable from the operations of the companies which were found to be "common carriers in substance" in the *Pipe Line Cases* (234 U. S. 548). Champlin carries no one's products except its own. The companies in the *Pipe Line Cases* were found to carry "everybody's oil".

(2) It is vitally necessary to the security of its business that Champlin have the full capacity of the pipe line for the movement of its own products to market

The building of the products line saved Champlin from practical extinction, and its unrestricted use is now equally imperative to enable Champlin to hold its present position in the market which it serves.

This conclusion is supported by the Commission in its decision in the Valuation Case, where it was said:

> "For some years prior to 1935, the business of the Champlin showed a steady decline, because the construction of refineries in areas near former markets and the operation of pipe lines, barge lines, and transport trucks provided sources of supply near many customers, all of which was destructive of trade connections of the Champlin in the territory thus affected. The construction of the pipe line resulted in an upward trend in business of the Champlin so that by 1940 the company had reached a volume of business equal to the peak previously enjoyed." (49 Val. Rep. 463) (Valuation R. Vol. II, p. 528)

The Three Judge Court confirmed the Commission's findings in these respects in this proceeding. (R. 44) See Exhibit 2, Exhibit Volume 1, p. 1. (R. 90-92, 140)

The Champlin Company does in fact employ the full capacity of its products pipe line.

The Commission found in this proceeding:

> "For all practical purposes, the entire capacity of the pipe line is used in transporting the products of

Champlin's refinery for distribution in this area." (R. 145)

The Three Judge Court found in this connection:

> "* * * Champlin uses the capacity of this pipe line in moving these products to its marketing territory in and around Hutchinson, Superior and Rock Rapids, and the pipe line constitutes the only means by which Champlin can move its products to its said marketing territory on an equal marketing basis with its larger and more powerful competitors. If Champlin were compelled to share its pipe line with its competitors, the result would be to deny to Champlin access to a market upon which Champlin's continuing in business depends." (R. 43, 44)

(3) There is not the slightest element of monopoly in Champlin's operations

No *shipper* is dependent upon the use of Champlin's line. The Commission and the Three Judge Court agree as to this conclusion.

The Commission in its report, found in this respect, as follows:

> "The capacity of the pipe line (Champlin's), 9,800 barrels a day * * *. The common-carrier pipe line capacity available to refineries in Oklahoma and Kansas aggregates 172,800 barrels a day, and respondent's pipe line is the smallest of any common carrier or private pipe line operating in this territory. *Apparently, common-carrier pipe line transportation is available to any small refiner in this area desiring such transportation.*" (R. 145) (Italics ours)

The Three Judge Court agreed with the Commission upon the foregoing finding and made the further finding:

> "No refiner of petroleum products other than Champlin is dependent on the Champlin line as an outlet to the markets." (R. 46)

Exhibit 4, Exhibit Volume p. 3, (R. 95, 140) shows graphically the vast amount of common carrier pipe line capacity in the area, as compared with the relatively inconsequential capacity of the Champlin's private line.

Furthermore, no purchaser of products is dependent upon Champlin's pipe line.

The Commission's finding on this point is as follows:

> "Only about 1.98 percent of the total gasoline consumed in the area is moved through the pipe line and sold from respondent's terminal storage facilities. (R. 145)
>
> • • •
>
> "Champlin's daily refining capacity of 18,000 barrels is small compared with the capacity of its large competitors in the same area. There are 86 wholesale outlets, including refineries, pipe line terminals, and barge terminals, in this marketing area which are competing for the business of practically every prospective customer and, in addition, any jobber in the area may purchase his products from the 60 or more refineries in Oklahoma, Kansas, Arkansas, Illinois, Indiana, Texas, Wyoming, and Montana, which deliver petroleum products into the territory by truck and rail." (R. 145)

The Three Judge Court agreed upon the above quoted finding and made the following additional findings:

> "No purchaser of refined products is dependent upon the Champlin pipe line as a source of supply. There are 86 wholesale outlets in the trade territory served by Champlin, distributing the products of 28 refineries. Every purchaser or prospective purchaser of Champlin products in this trade territory has available to him the products of these many marketers that are competing with Champlin in the sale of petroleum products. Purchasers of Champlin products buy in a competitive market and are free to sell at prices over which Champlin does not have any control. For the six months period immediately prior to the institution of the proceedings by the Commission which resulted

in this action, only 1.98 percent of all of the gasoline consumed in the area served by the Champlin pipe line was moved through its pipe line and sold from its storage facilities." (R. 46)

See Exhibit 3, Exhibit Volume p. 2, (R. 92, 140) for map showing location of wholesale outlets consisting of refineries, pipe line terminals and barge terminals.

The Three Judge Court further found:

"Champlin is what is known in the industry as an independent company. It is a small company in comparison with companies with which it competes in the area reached by its pipe line. It occupies such a relatively minor place in the gasoline market in the middle west that it is in no position to control the price of gasoline, kerosene, tractor fuel or burning oil, either by raising or lowering the price thereof; it is in no position to support price advances by its competitors or to survive price cutting by its competitors. Champlin does not have a monopoly or any power to establish a monopoly either in the transportation of petroleum products into the trade territory or in the sale of petroleum products therein. Champlin's acts create competition." (R. 47)

Exhibit 9, Exhibit Volume p. 7, (R. 101, 140) shows that Champlin sells less than 2% of the products consumed in its marketing area. This Exhibit further shows the relative volume of products sold by Champlin in each state therein.

See, also, Exhibit 6, Exhibit Volume p. 5, (R. 99, 140) which shows capacities of refineries using pipe lines in the area.

The facts referred to in this sub-head sharply distinguish the situation in the present case from that in the *Pipe Line Cases*, in which the pipe line companies there involved were found to have a virtual monopoly on pipe line transportation from the fields, east of the Rocky Mountains.

These facts also distinguish Champlin's operation from the rule of the *Valvoline* Case, in which it was stated that:

> "Certainly one would find a public interest in the *sole means* of transporting this commodity from thousands of wells for thousands of producers." (308 U. S. 145) (Italics ours)

The Government points out in its brief that Champlin's refinery, with capacity of 18,000 barrels per day, is the fifth largest in Oklahoma.

However, it is not the size of a single refinery but the aggregate refining capacity of the company which determines its power in the market. Champlin has but one refinery serving one marketing territory. The larger companies, in contrast, have many refineries serving many marketing territories.

Of the companies which compete with Champlin for the market, one has an aggregate refining capacity of 412,200 barrels per day, or almost 24 times that of Champlin. One has a refining capacity of more than 20 times that of Champlin; two have refining capacities of more than 15 times that of Champlin; three have refining capacities of more than 10 times that of Champlin; four have capacities of more than 5 times that of Champlin. See Exhibit 7, Exhibit Volume p. 6. (R. 100, 140)

(4) Competing refiners could make tenders of products to the Champlin line which would, in large part, appropriate Champlin's line and drive it out of the markets

If one or more of Champlin's large and powerful competitors decide that they wish to appropriate part of Champlin's market, they could readily do so if Champlin's line were forced to accept any and all tenders of products made to it.

The finding of the Three Judge Court on this subject is as follows:

> "If Champlin were forced to open its line to the public, its competitors could make tenders to the extent that Champlin would be deprived of any use of its pipe line, and thereby of its means of access to the

market upon which Champlin depends. Twenty-three refineries (having a combined refining capacity of 365,000 barrels of crude oil per day) make deliveries of petroleum products into Champlin's trade territory through two common carrier pipe lines, one of which with more than 4 times the capacity of the Champlin line, crosses the Champlin line near Hutchinson, Kansas. Three of these refiners market petroleum products in Southwest Nebraska in quantities equalling more than 27% of the Champlin pipe line capacity in that area. These three companies could use a substantial part of Champlin's pipe line capacity and the additional 20 refineries above referred to could make tenders in excess of the total capacity of the Champlin line." (R. 46, 47)

See Exhibit 6, Exhibit Volume p. 5. (R. 99, 140)

The vital consideration to Champlin would be its loss of markets. The Three Judge Court found as follows on this point:

> " • • • the pipe line constitutes the only means by which Champlin can move its products to its said marketing territory on an equal marketing basis with its larger and more powerful competitors. If Champlin were compelled to share its pipe line with its competitors, the result would be to deny to Champlin access to a market upon which Champlin's continuing in business depends." (R. 44)

The Commission did not make any finding upon these conclusions.

We refer the Court to Exhibit 5, Exhibit Volume p. 4, (R. 96, 140) which discloses the vast amount of refined products which could be tendered to the Champlin line.

The facts hereinabove set out show that the taking of Champlin's property by the Commission's proposed order would not only be real and substantial, but disastrous to the business of the company as well.

(5) Champlin never transports products for any customer

Proof of the above statement is shown by Champlin's method of sales and deliveries. The findings of the Three Judge Court on this point are as follows:

> "Champlin markets the products that have been moved through its pipe line only after they have come to rest in storage tanks at the three named places and in instances of some products only after there has been an additional processing." (R. 43)
>
> • • •
>
> "All products which have been moved by means of the pipe line were manufactured by Champlin and belonged to Champlin, and Champlin in all instances retained title thereto, until sales were later made from the bulk storage tanks in which the products had come to rest after the pipe line movement. In no instance has Champlin made a sale on the condition that the products sold would be moved by means of the pipe line or contracted for the use of the pipe line as a means of making delivery of any petroleum products. At no time have any products been placed in the line consigned to or destined for any particular purchaser." (R. 43)

The Commission did not make any finding upon the facts hereinabove stated.

(6) Champlin uses its pipe line and its terminal storage as plant facilities

Champlin regularly uses its products line to relieve refinery storage, including the building up of stocks of burning oils in the terminals in the late summer so as to have sufficient stocks for the winter demand and the building up of gasoline stocks in the spring to care for the summer demand. (R. 122, 123)

Since the trial in the Valuation proceeding, and at the time of the trial of this proceeding, Champlin was constructing Ethyl plants at the Superior and Rock Rapids

terminals at a cost of approximately $30,000 each, to be used for the purpose of further treating and preparing for sale, gasoline stored at the terminals and for further processing approximately 20 percent thereof into Ethyl gasoline, a higher quality product for which there is a necessary demand on the market. (R. 127)

The processing which is performed at the terminals transforms the gasoline so processed into Ethyl gasoline and is distinctly a part of the manufacturing process.

> "The pipe line is * * * a plant facility." (Finding of fact (No. 5) of Three Judge Court, R. 42)

The facts set out under sub-heads 5 and 6 above, confirm Champlin's contention that its pipe line is not engaged in transportation for its customers, but on the contrary is a mere incident to the primary business of the company, which is the refining and marketing of petroleum products.

(7) Champlin's present pricing method is based solely upon competitors' prices; there is no element of a transportation charge in Champlin's prices

On May 10, 1948, the Champlin Company adopted its present method of pricing products which are sold from its pipe line terminals, which may be described as follows:

Champlin posts a separate set of prices for each of its three pipe line terminals. (R. 107) These terminal prices are determined solely by the competitive markets at the respective places of destination. (R. 108) Prior to the inauguration of the new pricing system, the Champlin sales organization made careful surveys of market prices and from this data the new terminal prices were set at those figures which were required to meet competition at the various destinations. (R. 121) These terminal prices are now determined in exactly the same manner as any other local merchant in the area would set his prices, whether for food, clothing or gasoline. No charge of any kind is added to the price at which the customers buy the products. (R.

121, 122) Allowances off of these posted prices are deducted whenever the destination is a locality where competitive conditions require a lesser price. These allowances are also posted. (R. 503-513) See, also Exhibit 16, Exhibit Volume p. 8. (R. 109, 140)

At the time of the trial of the Valuation Case, Champlin was using the so-called "differential" system for the pricing of its products. Briefly stated, the differential was a sum which, when added to what was the sale price of the products at the Enid refinery, resulted in the sale price f.o.b. the pipe line terminal that enabled the purchaser to move the products from the storage tanks at the pipe line terminal where he made his purchase to his place of business by means of his own choice, with a total resulting cost to him that did not exceed the sum for which he could have bought such products from Appellee's competitors, delivered at such purchaser's place of business.

In view of the importance attributed to the differential pricing system in the majority opinion in the Valuation Case, it is highly significant here that the differential method of pricing has been completely abandoned by Appellee.

The finding of the Commission on Champlin's present pricing method is as follows:

> "The differential method of pricing was abandoned on May 10, 1948. On and since that date the terminal prices have been posted at each terminal, and competitive market conditions are met by allowances under these terminal prices where required. These allowances range from ⅛ cent to ½ cent per gallon and are intended to place respondent's products on the market at the general market price in each locality served by the pipe line." (R. 143, 144)

The Commission concedes that the change in pricing methods resulted in a real change in prices:

> "The change-over on May 10, 1948, resulted in net increases or decreases of from ⅛ cent to ½ cent per

gallon at more than 70 percent of the destinations served by respondent out of its Superior and Rock Rapids terminals. A change of ⅛ cent per gallon or more is recognized in the trade as substantial." (R. 144)

The Commission further concedes that no separate charge is made by Champlin for transportation:

"No separate charge as such is now made for transportation, either in the invoices or in any contract for the sale of its products." (R. 144)

The Three Judge Court found that:

"No pipe line transportation charge is made either directly or indirectly to any purchaser of Champlin's product.

"No charge of any kind for transportation is stated in any invoice, and no provision for transportation charge is provided in any contract made by Champlin for the sale of its products. Champlin does not change its price structure because of increase or decrease, in cost of operating its products pipe line." (R. 45, 46)

The change in the factual situation as disclosed under sub-heads 6 and 7 above have eliminated the legal basis for this Court's decision in the Champlin Valuation Case, and warrant a determination by this Court that Champlin is not now under the Interstate Commerce Act.

SUMMARY OF THE ARGUMENT

1. The judgment in the prior suit was limited to an adjudication that the order directing Appellee to file inventories, schedules, maps and charts of its pipe line properties was valid. What the Court said in argument in reaching that conclusion, and particularly what the Court said to the effect that Appellee was engaged in transportation in interstate commerce, is not the judgment.

In the prior suit the Court held that the first order did not involve an unconstitutional taking of Appellee's prop-

erty, and said, in effect, that its decision did not rest upon any view that the Interstate Commerce Act does, or that legally it could, authorize the Commission to make or enforce orders which would require a private carrier to become a common carrier, and that the conclusion of the Court that the order there challenged was valid, did not afford any implication of a holding that the Act does, or legally could, authorize the Commission to require a private carrier to become a common carrier. Having expressly disavowed any intention to make any such holding, the Court then added that when, and if, the Commission makes any order changing Appellee's obligations to any other person or corporation "it will be timely to consider concrete requirements and their specific effects on appellant." (Appellee here)

In this suit the Court has before it the very issues upon which it reserved judgment in the prior suit. The challenged order has the effect to require Appellee to offer the services of its pipe line to the public. Appellants recognize this fact and state in their brief (39) that:

> "It is submitted therefore that it is appropriate for the Court to pass upon the question whether the due process limitations of the Fifth Amendment are violated if Champlin may be required, under any circumstance, to transport goods other than its own."

The "differential" which was treated, in the former case, as important in arriving at the conclusion that Appellee was engaged in transportation within the meaning of the Act has been abandoned (R. 44-45). The facts with respect to the pipe line operations have been more fully developed in this record than they were in the record in the prior case. It now appears that there is further processing of the products after they reach storage. Thus the bases for the conclusion that Appellee is engaged in transportation within the Act no longer exist. This suit then presents a different fact situation.

2. The order of the Commission involved in this suit, if enforced, would require Appellee to offer the services of its pipe line to the public. It is, therefore, void because it attempts a taking of private property in violation of the Fifth Amendment to the Constitution of the United States, notwithstanding Appellee's line was built after the enactment of the Hepburn Amendment.

3. The Interstate Commerce Act was directed at carriers engaged in interstate transportation of passengers or in interstate transportation of property for others. The Act was intended to prevent persons so engaged from exacting excessive charges for their services and from discriminating between passengers and between shippers. It was enacted to regulate interstate commerce and not to command that any person enter that field of business. It was directed "at common carriers exclusively * * * and not even at all these."

In the cases which have reached this Court involving pipe line operations, with the exception of the prior Champlin suit, the Court has held the operations of pipe lines to be within the reach of the Act only where the facts showed that the pipe line was engaged in transporting oil for others. It was the issue of whether the transportation was for the owner or for others that determined whether or not the pipe line operation was within the reach of the Act.

If the Act were construed to authorize the order involved in this suit, it would be void for its conflict with the Due Process Clause of the Fifth Amendment.

ARGUMENT.

1. The judgment in the prior suit was limited to the issue of the validity of the order there involved, and the judgment in that suit does not operate to estop Appellee to challenge the validity of the order involved in this suit

The order involved in the prior suit purported to have been issued under the authority of section 19(a) of the Interstate Commerce Act. Its purpose was to require Appellee to supply the Commission with inventories, schedules, maps and charts of its pipe line properties. The majority of the Court held that the order was authorized by the Act. The judgment in the suit was limited to an adjudication that the order there involved was within the power of the Commission.

The order involved in this suit is a materially different order from the order involved in the prior suit. This order would, if enforced, require Appellee to file schedules of rates and charges for the interstate transportation of petroleum products by means of its pipe line, and thus to offer the facilities of its pipe line to the public for the interstate transportation of petroleum products at the rates and charges stated in the schedules. By no stretch of the rule of *res judicata* or of the principle of estoppel by judgment can it be said that the decision in the prior suit determined that the Commission had power to issue and enforce the order involved in this suit.

Appellee does not understand that Appellants contend that the judgment in the prior suit is *res judicata* of the issue involved in this suit, but rather that Appellants contend that Appellee is estopped by expressions in the majority opinion in the prior suit to contend in this suit that it is not engaged in transportation within the meaning of the Act. The minority of the Court expressed the view that Appellee was not engaged in transportation within the contemplation of the Act and that it was not covered by the

Act. The majority expressed the view that Appellee's operations did amount to transportation within the meaning of the Act.

Even if it be assumed that the statement in the majority opinion, alluded to and relied upon by Appellants, is a statement which ordinarily would support an application of the principle of estoppel by judgment or collateral estoppel, though that appears doubtful under the opinion in *Commissioner* v. *Sunnen*, 333 U. S. 591, 599-600, it could not properly be applied here because this Court in the majority opinion in the prior suit expressly reserved judgment on the validity of such an order as that involved in this suit.

Justice Jackson in writing for the majority in the prior suit disclaimed any purpose or intent to hold that the Interstate Commerce Act gave the Commission power to convert Appellee's private pipe line into a common carrier; and said that what had been stated in the opinion afforded no support for such an implication. Further he said that Appellee's contention that the order there brought under review had the effect to take Appellee's property without due process was premature on the then record; that "so far" the Commission had not made any order "which changes the appellant's obligations to any other company or person". And, he added for the majority, that, when the Commission makes an order that has the effect to change Appellee's relation to others, "it will be timely to consider concrete requirements and their specific effect on appellant" (Appellee).

This suit presents to the Court the very issue upon which the Court so reserved judgment in the prior suit. The order challenged here has the effect to require Appellee to offer the services of its pipe line to the public and to make of its pipe line a common carrier for hire.

The Courts and the Commission recognize that to publish and file "tariff schedules showing the rates and charges for interstate transportation of refined petroleum products

between different points on its own route" would constitute an offer to the public to transport petroleum products upon the terms and at the rates and charges set forth in the schedule.

Commissioner Splawn, now Chairman of the Commission, in dissenting in part from the report here involved, correctly described in the following language (R. 151) the purpose of the majority of the Commission and the effect of the order:

> "The publishing of tariffs pursuant to the finding in this report will place upon Champlin the legal obligation to perform the transportation service specified in those tariffs, and to conform to the requirements of section 1(4) of the Act which provides that 'It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates' etc."

Commissioner Mitchell, dissenting, said (R. 152):

> "To require that Champlin publish and file tariffs, with us can only be for one purpose viz: to make Champlin's pipe line available for use by all shippers. If that is not the purpose, then the requirement that tariffs be filed is an idle and futile gesture."

In the opinion below Judge Phillips said that if Appellee would publish and file tariffs as directed by the order "that would constitute an implied invitation to the public to tender petroleum products for transportation by Champlin's pipe line and would convert it from a carrier solely of its own products into a common carrier of products of others for hire."

This Court has consistently approached an order to file tariffs as involving the constitutional question as to whether a private carrier is thereby being converted into a common carrier. In *The Pipe Line Cases* (*Prairie Oil & Gas Company* v. *United States*, 204 Fed. 798), the Commerce Court

treated the order directing pipe line operators there involved to file "schedules of their rates and charges for the transportation of oil, in compliance with the provisions of the act to regulate commerce" as an attempt to impose upon the parties there involved, against their will, the status of common carriers. Justice Holmes in the majority opinion in the appeal in that suit squarely decided the constitutional question by finding that since the Standard companies were common carriers in substance, the Congress had power to require them to become such in form, and consequently that the Act did not have the effect to convert them into common carriers,—they were already common carriers.

Producers Transportation Company v. *Railroad Commission*, 251 U. S. 228, and *Smith* v. *Cahoon*, 283 U. S. 553, 563, are cases which recognize the proposition that to require a private carrier to file schedules of rates and charges for transportation of commodities is, in effect, to call upon such private carrier to become a common carrier and devote its property to the use of the public.

Appellants recognize that the issue here is: Can the Interstate Commerce Commission lawfully force Appellee to operate its pipe line as a common carrier for hire? It so appears from pages 38-39 of Appellants' brief where, having said that an order to file a schedule of rates and charges was the action involved in *The Pipe Line Cases*, Appellants then said:

> "It is submitted therefore that it is appropriate for the Court to pass upon the question whether the due process limitations of the Fifth Amendment are violated if Champlin may be required, under any circumstances, to transport goods other than its own."

There is further reason why the judgment in the prior suit does not operate as an estoppel to bar Appellee's challenging the validity of the order involved in this suit. In the prior suit the United States and the Interstate Commerce Commission contended that there were significant

differences from the pipe line operations of the Uncle Sam Company involved in *The Pipe Line Cases*, 234 U. S. 548, 561-562. The differences which the United States and the Interstate Commerce Commission contended were significant and important to distinguish the two operations were (1) that Appellee's pipe line was used to transport "finished products", while the Uncle Sam Company used its pipe line to transport "raw materials" and (2) that Appellee used in its pricing formula what was called a "differential", which the United States and the Interstate Commerce Commission argued constituted a charge for transportation. (Pages 21-22, 24-25 of Brief for the United States and the Interstate Commerce Commission, *Champlin Refining Company* v. *United States*, 329 U. S. 29)

The majority of the Court in the opinion in the prior suit (329 U. S. 29, 33) was of the view that the "differential" pointed up a significant distinction between Appellee's operations there involved and the operations of the Uncle Sam Company involved in *The Pipe Line Cases*; and also gave significance, in distinguishing between the two operations, to the supposed fact that "manufacturing processes" had been completed.

Appellee abandoned the pricing formula which included the "differential" and adopted the practice of marketing its products on posted prices. Separate sets of prices are posted at each of the pipe line terminals. When competitive conditions require, allowances are made from these posted prices. The change to this method of pricing resulted in a price change varying from ⅛ cent to ½ cent per gallon at more than 70 per cent of the destinations served by Appellee out of its storage tanks at Superior and Rock Rapids. A change of ⅛ cent per gallon or more is recognized in the industry as substantial. (R., 33-34, 45, 116, 120-121) The abandonment of the pricing system that included the "differential" and the adoption of the system of selling on posted prices, therefore, effected a material change in Appellee's method of transacting its business.

The record in the prior suit was silent as to whether or not there were any further manufacturing processes after the products were placed in the pipe line. The facts in this particular have been developed in this record. The record shows that after the products come to rest in storage tanks at the pipe line terminals there is further blending and treating of some of the products, which blending and treating necessarily have an effect upon the quality of the products, and that at the time of the trial Appellee was constructing Ethyl plants at or near the Superior and Rock Rapids storage tanks for use in further treating for sale gasoline stored at those terminals (R., 42).

Appellants, having contended in the prior suit that the "differential" and the supposed shipping of only finished products were important factors, have now changed front. In an attempt to justify their claim of estoppel by judgment, they now contend that the abandonment of the "differential" was a change in form and not in substance, that the treating and blending of the gasoline do not effect a material change in the commodity and that these factors were not controlling in the prior suit: (Br., 21, 30, 34, 35)

The difference in the facts as shown by the record in the prior suit and the facts as shown by the record in this suit is on matters which were deemed of controlling importance in the prior suit. Hence Appellants' claim of estoppel by judgment cannot be urged successfully.

2. The Commission order involved in this suit is void because its enforcement would result in a taking of Appellee's property without due process of law.

The power delegated to Congress to regulate commerce among the several states is not an absolute power. It must be exercised in subjection to the Due Process Clause of the Fifth Amendment. (*Currin v. Wallace*, 306 U. S. 1; *The Pipe Line Cases*, 234 U. S. 548, 560-561, 563; *Railroad Retirement Board v. Alton RR. Co.*, 295 U. S. 330; *United States v. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*,

282 U. S. 311; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447) The power granted to Congress is the power "to regulate commerce." Congress is without power "'to do anything about commerce which is not regulation.'"

In general the restraints imposed upon the Congress by the Due Process Clause of the Fifth Amendment are the same as the restraints imposed on the states by the Due Process Clause of the Fourteenth Amendment. (*Bowles, Price Administrator* v. *Willingham*, 321 U. S. 503, 518; *Hansberry et al.* v. *Lee et al.*, 311 U. S. 32, 42-44; *Curry* v. *McCanless*, 307 U. S. 357, 370; *Heiner* v. *Donnan*, 285 U. S. 312, 326; *Coolidge* v. *Long*, 282 U. S. 582, 596; *Nebbia* v. *New York*, 291 U. S. 502)

Because of the Due Process Clause of the Fourteenth Amendment, a state cannot "by mere legislative fiat or by any regulatory order of a commission convert into a public utility" a pipe line which has never been devoted by its owner to use by the public, "or make its owner a common carrier." (*Producers Transportation Company* v. *Railroad Commission of California*, 251 U. S. 228; *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570; *Frost & Frost Trucking Company* v. *Railroad Commission of California*, 271 U. S. 583; *Washington ex rel. Stimson Lumber Co.* v. *Kuykendall et al.*, 275 U. S. 207; *Smith* v. *Cahoon, Sheriff*, 283 U. S. 553) The continuing force of the principle applied in the above cases was recognized by Mr. Justice Brandeis in writing for the full court in *Thompson* v. *Consolidated Gas Utilities Corporation*, 300 U. S. 55, 79. Appellants are obviously mistaken in their contention that this principle "is no longer controlling" upon the authority of the *Nebbia* case, 291 U. S. 502.

While a state may, in the reasonable exercise of the police power, regulate the operations of a private carrier for hire, it cannot, consistently with the Fourteenth Amendment, by legislative act, require a private carrier to become a common carrier. Any legislative requirement that such private carrier become a common carrier would amount to a pro-

hibited taking of property. (*Smith* v. *Cahoon, Sheriff, supra; Frost & Frost Trucking Company* v. *Railroad Commission of California, supra; Michigan Public Utilities Commission* v. *Duke, supra*)

Each of the cases cited in the preceding paragraph involve an attempt to impress a common carrier status on a for hire contract carrier. Appellee's line in this case is not engaged in transportation either as a common or contract carrier. It is engaged solely in the movement of Appellee-owned products from its refinery to its storage terminals along the line.

Again, where a pipe line owner uses its pipe line only to transport its gas to market, a state cannot require such pipe line owner to become a common carrier. (*Texoma Natural Gas Company* v. *Railroad Commission of Texas*, D. C., 59 Fed. (2d) 750, 753)

Because of the Due Process Clause of the Fifth Amendment, the Congress cannot by legislative act convert a private pipe line into a public utility, or require its owner to become a common carrier. (Chief Justice White's concurring opinion, *The Pipe Line Cases*, 234 U. S. 548, 562-563) The power to regulate commerce "cannot be made a means of exercising powers not entrusted to it (Congress) by the Constitution." (Mr. Justice Holmes' majority opinion, 234 U. S. 560-561) The power to require a private carrier to become a "common carrier" is withheld from Congress by the Fifth Amendment.

The Constitution protects a citizen in his right to move his property from one state to another by his privately owned and operated means. This right existed before the Constitution was adopted, and was not surrendered in the adoption of the Constitution. The right may be enjoyed by using the highways and privately owned and operated vehicles, or by purchasing a right of way and constructing and operating a private railroad or pipe line. (*Pennsylvania Railroad Company* v. *Public Utilities Commission of Ohio*, 298 U. S. 170) The exercise of the right may be reg-

ulated by Congress; but Congress cannot, under the guise of regulation, condition the exercise of the right upon the user's becoming a common carrier and making of his property a public utility. The power to regulate the exercise of a right does not include the power to take for a public use private property essential to the exercise of the right. "Conduct may be regulated which cannot be initially commanded * * *" (Mr. Justice McKenna's dissenting opinion in *The Pipe Line Cases*, 234 U. S. 565); and so, while Congress may regulate interstate commerce, Congress cannot command that a citizen engage in interstate commerce as a common carrier or otherwise. Any such attempt would necessarily involve an effort to take property without due process of law.

While contending that the parts of the order which, if enforced, would require Appellee to file "annual, periodical or specific reports" and "to institute and henceforth maintain a uniform system of accounts applicable to pipe lines" are not subject to attack on constitutional grounds, Appellants admit that the part of the order which requires the filing of schedules showing rates and charges for interstate transportation, "bears a close relation to the duty to furnish transportation to others upon reasonable request therefor" and say, in effect, that the question of whether the Due Process Clause of the Fifth Amendment would be violated if Appellee is required to transport petroleum products for others is before the Court for determination. (Br., 37-39)

Appellants divide the order into two parts and, conceding that the validity of the requirement to file schedules of rates and charges is open to debate, contend that the requirement to file reports and the requirement to institute and maintain a uniform system of accounts are separable from the balance of the order and are within the power of the Commission and are not subject to challenge upon constitutional grounds.

All of the requirements are set forth in one order. They are all founded upon the conclusion of the Commission that Appellee is a common carrier by pipe line, subject to all provisions of the Interstate Commerce Act relating to pipe lines engaged as common carriers for hire. The requirements to file reports and to institute and maintain a uniform system of accounts are predicated upon the Commission's assumption that Appellee is a common carrier by pipe line which the Commission lawfully can compel to file schedules of rates and charges. The reports which Appellee is directed to file and the system of accounting which Appellee is directed to install and maintain are such as are designed for common carriers for hire. (R., 357-483, 181-284) The provisions of the order directing Appellee to file reports and to institute and maintain the system of accounting is from the face of the record intended by the Commission to be effective upon Appellee's filing schedules of rates and charges and operating its pipe line as a common carrier for hire.

The order is one order. Its several parts are directed toward the common end of requiring Appellee to become a common carrier for hire and to do those things which the Commission can require of only common carriers.

In so far as the order of the Commission attempts to compel the Appellee to tender the use of its pipe line to the public, Appellants attempt to justify the order upon the propositions (1) that Appellee can protect itself against unreasonable tenders by imposing in its tariffs limitations and conditions; (2) that Appellee can charge compensatory rates for its services (Br., 39-40); and (3) that Appellee's pipe line was constructed subsequent to the enactment of the Hepburn Amendment. (Br., 40-42)

Any legislative act or administrative order which directs a person to devote his property to the demands and uses of the public is an attempt to take his property for the use of others. If such an order were effective, the owner would immediately lose the full right to personally use and enjoy

his property. Compensation for use of the property would not eliminate the element of taking. Compensation for use is not payment for property. Imposition upon an owner of a duty to share with others the use of his property is a taking of property. The fact that a program which involves such a taking may contemplate payment for the use of the property is not sufficient to justify the taking. It has never been held sufficient.

In *Associated Pipe Line Co.* v. *Railroad Com.*, 176 Cal. 518, 169 P. 62, 66, the Court said:

> "However this may be, and conceding the evidence ample to support the finding, such fact cannot warrant the taking of private property for public use without compensation for which no provision is made or contemplated. True, the exaction of tolls for actual service will be allowed, but there are elements of damage due to the subjection of the property to the public service not covered by charges for service performed for which no compensation is made. That subjecting petitioners' property to the use of the public as common carriers constitutes a taking of the same, admits of no controversy."

Construction of the pipe line was necessary to Appellee's continuance in business (R., 44); Appellee uses the entire capacity of its pipe line on a full-time basis in moving the products of its refinery to storage (R., 42); if Appellee were compelled to share its pipe line with its competitors they could make tenders to the extent that Appellee would be deprived of the necessary use of its line and thereby of its means of access to the markets upon which Appellee's continuing in business depends (R., 44, 46). Construction of additional facilities would be necessary to enable other refiners to make use of Appellee's line (R., 44). Obviously any order that compels Appellee to share its pipe line with other refiners will not only be a taking of Appellee's property for a public use in the sense that the pipe line will be subject to the use of Appellee's competitors, but if the opportunity is availed of by Ap-

pellee's competitors, they could, in effect, destroy Appellee's business. The oil business is a highly competitive one.

The pipe line here involved is not a separate entity. It is a facility of Appellee's refinery that connects its refinery with its storage tanks in areas where Appellee can market its products in open competition at prices that will enable Appellee to remain in business as a refiner of crude petroleum and a marketer of the products of crude petroleum. If Appellee is forced to open its pipe line to other refiners and they use the line, the resulting loss to Appellee's business will not be taken into account in rate making, and Appellee will suffer loss for which the law offers no compensation. The law's protection in such circumstances is found in the Fifth Amendment. It prohibits the taking.

The Government's economic theory

The Government's brief gives importance to the economic theory that inasmuch as Champlin has constructed an efficient means of transportation for its own use, it would be in the public interest to allow the public to seize it for the benefit of all competing refiners.

Quite aside from the constitutional prohibition of such seizure of private property, we submit that the Government's economic theory is entirely erroneous. The greatest public interest in the petroleum products market, is that freedom of competition between both large and small companies, be allowed to continue in order that the public may have the benefit of the lowest possible prices. Champlin and other small companies have had to build private pipe lines in order to be able to place their products on the market at prices which compete with the larger companies. If these companies are now compelled to submit to an appropriation of their pipe line capacity by these same large competitors, it would merely mean that these independents will be eliminated from the market. Champlin and other small

companies similarly situated would be back in the same position as they were when declining markets forced them to either build private pipe lines or withdraw from the market. Thus, the order of the Commission in this action, would have the very effect which the Supreme Court's order in the *Pipe Line Cases* was designed to prevent, that is, the fostering of a monopoly.

The future pipe line question

Finally, Appellants take one sentence in the opinion in *The Pipe Line Cases* out of context and attempt to find in it a refuge from the force of the Fifth Amendment. The sentence is emphasized in the following quoted part of the opinion:

> "The control of Congress over commerce among the States cannot be made a means of exercising powers not entrusted to it by the Constitution, but it may require those who are common carriers in substance to become so in form. *So far as the statute contemplates future pipe lines and prescribes the conditions upon which they may be established there can be no doubt that it is valid.** So the objection is narrowed to the fact that it applies to lines already engaged in transportation. But, as we already have intimated, those lines that we are considering are common carriers now in everything but form. They carry everybody's oil to a market, although they compel outsiders to sell it before taking it into their pipes."

Appellants say (Br., 40-41) that Appellee's pipe line was constructed subsequent to enactment of the Hepburn Amendment (June 29, 1906) and that, therefore, the constitutional question as to the power of Congress to require it to operate as a common carrier was settled by the above emphasized sentence in the opinion in *The Pipe Line Cases*. The argument assumes that the sentence means what it does not mean.

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* Emphasis herein supplied.

Mr. Justice Holmes had found that the Amendment was directed at certain pipe line operations and that its evident purpose was "to bring within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price",—pipe lines that were common carriers "in everything but form". The identity of the lines at which the Amendment was directed was well known (234 U. S. 559,—"* * * we think it plain that it was intended to reach the combination of pipe lines that we have described."). The constitutional question was whether Congress had power to regulate as common carriers pipe lines that in effect had been devoted by their owners to the use of the public and which, as operated, were common carriers in substance, though not common carriers in technical form as understood at common law. Could Congress under such circumstances, within the limits imposed upon its powers by the Fifth Amendment, require those pipe lines which were common carriers "in substance to become so in form"? The Court found that there was no prohibited taking of property in allowing the Amendment to have its intended application to such existing pipe lines.

The emphasized sentence amounts to nothing more than a statement that Congress could for the future require pipe lines which operate as common carriers in substance (like the pipe lines at which the Amendment was directed) to become common carriers in form. The effect of Appellants' argument is to urge that the sentence means that Congress may provide for the future that any pipe line built across a state line or any private facility which is used to move property across a state line must operate as a common carrier and may be regulated as such. So construed the emphasized sentence would mean that the constitutional right of a citizen to move his property by private means from one state to another can, under the Commerce Clause, be denied unless he agrees to operate as a common carrier in interstate commerce. That would amount to saying that the Commerce Clause overrides the Fifth Amendment.

The inclusion of the "future pipe lines" language as to "common carriers in substance" was not without purpose. In the next paragraph of the opinion Mr. Justice Holmes pointed out that Standard Oil Company of Louisiana, a common carrier in substance within the language of the opinion, was incorporated after the enactment of the Hepburn Amendment. But, it does not appear that Standard Oil Company of Louisiana was held subject to the Amendment on that basis. It was pointed out in both the majority opinion and the dissenting opinion that Standard Oil Company of Louisiana purchased oil from the Prairie which bought at the wells in the Mid-Continent area (Oklahoma and Kansas) and delivered to the Standard Oil Company of Louisiana; and, in stating that its case was covered by what had been said, it was evident that the Court had reference to what had been said about the operations of the other Standard companies.

It is significant that the record in respect to the Uncle Sam Oil Company showed that as late as the spring of 1906 the Uncle Sam Oil Company was applying for pipe line right of way in the Indian Territory; and it was stated in affidavits in the record in that case that on November 16, 1906, the pipe line was constructed and in full operation (Tr. of Record, *United States et al* v. *Uncle Sam Oil Company*, No. 507, October Term, 1913, pages 47-48; Record in *Champlin Refining Company* v. *United States et al*, 329 U. S. 29, Volume II, pages 611, 612, 614-615, 689). While it is not expressly stated in the affidavits that the pipe line began operations on November 16, 1906, such clearly appears to be the date such line was put into operation. The Hepburn Amendment was approved June 29, 1906. So, if the affidavits which appeared in the record in the Uncle Sam Oil Company case are correctly interpreted, the Uncle Sam pipe line was "a future pipe line", but its case was not disposed of upon that theory.

Appellants also rely upon *Pierce Oil Corporation* v. *Phoenix Refining Company* 259 U. S. 125. Again Appel-

lants quote sentences and part sentences from the opinion. (Br., 40-42) In the following quotation from the opinion, Appellants' partial quotations are italicized; asterisks indicate only an omission of citations:

> "When the large discretion which the state had to impose terms upon this foreign corporation as a condition of permitting it to engage in wholly intra-state business is considered * * *, *the contention that this order of a tribunal to the jurisdiction of which the company voluntarily submitted itself, made after notice and upon full hearing, deprives it of its property without due process of law, must be pronounced futile to the point almost of being frivolous.* 'By accepting the privilege it voluntarily consented to be bound by the conditions' attached to it * * *; and, while enjoying the benefits of that privilege, it will not be heard to complain that an order, plainly within the scope of statutes in effect when it entered the state, is unconstitutional. *A claim so similar to the one we have here that the disposition of it should have been accepted as disposing of this case was dealt with by this court in the Pipe Line Cases * * *, in a single sentence, saying: So far as the statute contemplates future pipe lines, and prescribes conditions under which they may be established, there can be no doubt that it is valid.*" (259 U. S. 128)

On the basis of the italicized portion of the quotation, Appellants argue (Br., 42):

> "The above decision was not rested, even in part, on the proposition that one who has benefited from privileges conferred by statute may not attack its constitutionality. No reference is made in the court's opinion to any benefits derived by Pierce Oil from privileges conferred by the Oklahoma pipe line statutes."

From the above full quotation it is apparent that Appellants have misconceived the basis for the decision in the *Pierce Oil* case. The language of the opinion which is not italicized expressly grounds the opinion on the accept-

ance of privileges and benefits afforded by the Oklahoma Constitution and statutes. Further, the facts involved support this construction of the opinion. As a condition to the privilege of admission as a foreign corporation in the State of Oklahoma, Pierce filed a formal acceptance of the provisions of the Oklahoma Act which required it to become a common carrier (intrastate). As pointed out in the Oklahoma Supreme Court opinion (*Pierce Oil Corporation* v. *Phoenix Refining Company*, 79 Okla. 36, 190 P. 857, 859), Pierce received the benefits of rights relating to the highways and rights under and by virtue of other sections of the statute. As found by the Oklahoma Corporation Commission and confirmed by the Oklahoma Supreme Court (see 259 U. S. 126), Pierce had engaged in transportation for others, had a monopoly of the oil carrying business between the Cushing Field and Sand Springs, and was in substance a common carrier. The *Pierce* case has never been cited for the proposition contended for by Appellants; it has consistently been cited for the proposition that one who avails himself of the benefits of a statute cannot attack its validity (*Buck* v. *Kuykendall*, 267 U. S. 307; *Spaulding* v. *Douglas Aircraft Co., Inc.*, (C. C. A. 9th), 154 F. (2d) 419; *Central Nebraska Public Power & Irr. Dist.* v. *Federal Power Commission*, (C. C. A. 8th), 160 F. (2d) 782).

In this case there are no elements of estoppel. Appellee has received no benefits from the Act. Indeed, the Interstate Commerce Act does not purport to confer benefits; it only imposes burdens. It is purely a regulatory measure. Instead of claiming anything under the Act, Appellee has at all times consistently asserted that the Act has no application to its business.

Frost v. *Railroad Commission of the State of California*, 271 U. S. 583 (a future motor carrier case), was decided after *The Pipe Line Cases* and the *Phoenix* case. Frost was engaged in transportation solely as a private contract carrier under a contract dated December 14, 1923. (Record, *Frost* v. *Railroad Commission*, pages 15, 21, 28, October

Term, 1925) The California Act involved had been amended in 1919 so as to bring within its coverage private contract carriers operating between fixed terminals. The order under review directed Frost to cease transportation by auto truck over a certain route until it obtained from the California Railroad Commission a certificate of public convenience and necessity. The California Supreme Court found the order constitutional. It considered *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570, which held that a private carrier could not be constitutionally converted into a common carrier, inapplicable because:

> "If the contracts under which petitioners herein are operating had been entered into prior to the enactment of the 1919 amendment to our statute, and had been then subsisting and unperform[illegible] petitioners would have been in position to invoke [illegible]e authority of the Duke case. But petitioners' contract was not made until 1923, and they were under no compulsion to enter into it. They were free to elect as to whether they would engage in the business of transportation upon the public highways between fixed termini or over a regular route and thus subject themselves to the conditions and limitations of the statute, or whether they would refrain from so doing and thus retain their status of unregulated private carriers. They voluntarily chose the former course and thereby subjected themselves to the regulations imposed by the statute." (240 P. 30)

This Court, however was of the view that, as the effect of the California Act was to require Frost to operate as a common carrier, the Act as so applied was unconstitutional. This Court recognized that the only substantial question involved was whether the State could effect this unconstitutional result as a condition to the use of the highways by Frost. In that connection this Court said:

> "There is involved in the inquiry not a single power, but two distinct powers. One of these—the power to prohibit the use of the public highways in proper cases—the state possesses; and the other—the power

to compel a private carrier to assume against his will the duties and burdens of a common carrier—the state does not possess. It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden." (271 U. S. 593)

Mr. Justice Holmes, in his dissenting opinion in the *Frost* case, found only that California had the right to require a certificate of public convenience and necessity from a private carrier using its highways. In no place in his dissent did he indicate that the case should have been simply disposed of on the ground that the carrier involved was estopped from raising the constitutional issue because it was a "future motor carrier". To the contrary, he said: "I see nothing in this Act that would require private carriers to become public carriers * * *."

If requiring a "future" for hire contract carrier to become a common carrier as a condition to the use of the state's highways is prohibited by the Constitution, clearly requiring a "future" strictly private pipe line to become a common carrier where it had neither sought nor received any public privileges or benefits in relation to its operations, would be offensive to the Fifth Amendment. The latter principle was recognized by Mr. Justice Holmes in opinions written by him subsequent to the date of the opinion in *The Pipe Line Cases.*

Fidelity & Deposit Co. v. *Tafoya*, 270 U. S. 426, involved the question of the right of a state to refuse to admit a foreign corporation to do business within its borders. It was held that while the state may for any reason, or no reason, refuse the right to enter such state, such refusal cannot be conditioned upon such corporation's agreement to forego a constitutional right. Mr. Justice Holmes (270 U. S. 434), in the opinion, said:

> "Coming then to the merits, we assume in favor of the defendants that the State has the power and constitutional right arbitrarily to exclude the plaintiff without other reason than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

Western Union Telegraph Company et al. v. *Foster and Macleod et al.*, 247 U. S. 105, involved the validity of a state commission order requiring the sale of information to a particular person. The information was purchased by the telegraph company from the stock exchange and transmitted to other states and sold by the telegraph company. In that case the Court, in an opinion by Mr. Justice Holmes, said (247 U. S. 114):

> • • • "It is suggested that the state gets the power from its power over the streets which it is necessary for the telegraph to cross. But if we assume that the plaintiffs in error under their present charters could be excluded from the streets, the consequence would not follow. Acts generally lawful may become unlawful when done to accomplish an unlawful end, • • • and a constitutional power cannot be used by way of condition to attain an unconstitutional result."

Appellants further contend that Part II (motor carrier) and Part III (water carrier) of the Interstate Commerce Act sustain their argument that the application of Part I

to a "future pipe line company" would not be unconstitutional. This argument is based upon the premise that the constitutionality of Parts II and III has never been challenged in so far as they require a contract-carrier for hire to obtain a permit, which can be refused on the basis that the issuance of the permit would not be in the public interest. This argument is unsound for the reason that the very Acts involved specifically safeguard the constitutional principles for which Appellee now contends, in that they both recognize that "private carriage" within one's own business cannot and should not be brought within the orbit of public regulation.

3. The Interstate Commerce Act is directed only at persons and corporations engaged as common carriers for hire; and if it were construed to reach Appellee's pine line operations and to empower the Commission to promulgate and enforce the order here involved, the Act, so construed, would be invalid

It should not be supposed, that the principle upon which this Court refused to hold the operations of the Uncle Sam Oil Company within the reach of the Hepburn Amendment applies only to persons and corporations whose operations are in substance identical with those of the Uncle Sam Oil Company involved in *The Pipe Line Cases*.

The Standard Oil Company and its affiliates were engaged in affording to producers generally a means of transporting their oil. The operations of the Uncle Sam Oil Company were purely private in nature. One was public carriage; the other was private movement by an owner of its property. The Court construed the Hepburn Amendment as giving evidence that Congress recognized the distinction between public carriage of oil by pipe line and an owner moving its oil by its private pipe line, and saw in the amendment a purpose upon the part of Congress to subject to the regulations provided in the Act to Regulate Commerce only those engaged in public transportation by

pipe line. Considerations of constitutional limitations upon the power of Congres may or may not have had a bearing upon the construction so given the amendment. Be that as it may, the basis upon which the Uncle Sam Company's operations were held not to be within the reach of the Act was that the Uncle Sam Company was engaged in moving only its own property. It was not engaged in public transportation.

The Court found that the difference between public transportation and private carriage by an owner of its property was recognized in the Amendment, and effect was given to such difference in *The Pipe Line Cases.* Later cases appear to have given this interpretation to the opinion in *The Pipe Line Cases.* (*Producers Transportation Co.* v. *RR. Com.*, 251 U. S. 228; *Penn. RR. Co.* v. *P. U. C.*, 298 U. S. 170; *Associated Pipe Line Co.* v. *RR. Com.*, 169 P. 62; *Penn. RR. Co.* v. *Pittsburgh, L. & W. R. Co.*, 83 F. (2d) 861; *Smitherman & McDonald* v. *Mansfield Hard Lbr. Co.*, 6 F. (2d) 29; *Dairymen's Co-op Sales Assn.* v. *P. U. C.*, 177 Atl. 770; *Weisberger* v. *Penn. P.U.C.*, 7 Atl. (2d) 731; *Clear Creek Oil & Gas Co.* v. *Ft. Smith Spelter Co.*, 230 S. W. 897; *Schumacher* v. *RR. Com.*, 201 N. W. 241) If Appellee should be held, notwithstanding the private nature of its pipe line operations, to be subject to the Interstate Commerce Act and required to file schedules of rates and charges, it would be the only purely private carrier ever to have been stripped of the private nature of its business by legislative act or administrative order, and made to become a common carrier for hire.

The Hepburn Amendment (34 Stat. 584), in so far as it pertains to transportation of oil by pipe line, is printed in the Appendix, pages 70-73. The language of the amendment which is of importance here is as follows:

> "That the provisions of this Act shall apply to *any corporation or any person or persons engaged in the transportation of oil or other commodity*, except water and except natural or artificial gas, *by means of pipe*

lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this Act*, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States, or the District of Columbia, to any other state or territory of the United States, or the District of Columbia * * *." (Italics ours)

The amendment of 1920 (41 Stat. 474-478, 49 U.S.C., Sec. 1), in so far as it pertains to transportation of oil by pipe line, is printed in the Appendix, pages 73-76. The language of importance here is as follows:

"(1) That the provisions of this Act shall apply to common carriers engaged in * * *

"(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; * * *

"(3) The term 'common carrier' as used in this Act shall include all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping car companies; and all persons natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire."

By later amendments (48 Stat. 1102, 49 Stat. 543, 54 Stat. 899, U.S.C., Title 49, Sec. 1, and 62 Stat. 602) the part of sub-paragraph (3) of Section 1, last quoted above, was changed so that it now reads as follows:

"The term 'common carrier' as used in this Act shall include all pipe line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire. Whenever the word 'car-

rier' is used in this chapter it shall be held to mean 'common carrier.'"

Postponing for later further consideration the contention made by the Government that the Hepburn Amendment, as enacted and as amended, brought within the reach of the Act all interstate pipe lines, it will be now shown that Appellee's pipe line operations are not within the coverage of the Act because Appellee is not engaged in "transportation" within the meaning of the Act.

(a) The Original Act to Regulate Commerce

Section 1 (see Appendix, page 69) of the original statute (An Act to Regulate Commerce, Act of February 4, 1887, 24 Stat. 379) provided:

> "That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment * * * ."

The purpose of the statute was to prohibit rebates, discriminations and other abuses by common carriers, to require that they establish and post rates, fares and charges, and to prohibit their charging unjust or unreasonable rates. (*Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Company*, 145 U. S. 263). The statute was directed at common carriers.

It is obvious from the very language of the Act that the term "transportation" was used to describe interstate transportation by persons engaged as carriers of passengers and as carriers of property for others. There is an absence of any language indicating a different intent. The use of the term "transportation of passengers" would make this conclusion inescapable even if the term "common carrier" did not appear in the text of the statute.

One does not transport himself as a passenger. If the term "transportation" had been used to include the movement by a person of his own property from one state to another by use of his own private means, the statute would then have had the effect of subjecting such person and his property to the burdens, duties and regulations imposed by the statute. So construed, the statute would have been in conflict with the Due Process Clause of the Fifth Amendment. (Chief Justice White's concurring opinion in *The Pipe Line Cases,* 234 U. S. 548, 562-563; *Smith* v. *Cahoon, Sheriff,* 283 U. S. 553; *Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U. S. 583; *Stimson Lumber Company* v. *Kuykendall,* 275 U. S. 207, 210; *Michigan Public Utilities Commission et al.* v. *Duke,* 266 U. S. 570; *Producers Transportation Company* v. *Railroad Commission of California,* 251 U. S. 228).

(b) The Hepburn Amendment of 1906

The language which appeared in the original statute of 1887, *supra,* which was carried forward in the Hepburn Amendment (34 Stat. 584), is italicized in the following quotation from section 1 of the Hepburn Amendment:

> "That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any *common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment)* * * *."

The word "transportation" was used a number of times in the original statute. There is no language or expression

in the original statute (24 Stat. 379) to indicate that the term was there used in different senses in different instances. In the absence of expressions indicating a contrary intent, it will be presumed that the word was used in the same sense in each instance. (*United States* v. *Cooper Corporation*, 312 U. S. 600, 607). It has never been supposed that it was used in the original Act in any other sense than to refer to transportation of and for others than the carrier.

The term "transportation" was also used a number of times in the Hepburn Amendment, and it is to be presumed that it was there used in each instance in the same sense, and in the sense in which it was used in the original Act, unless a contrary intent appears. Words and provisions used in an original statute and repeated in an amendment will be presumed to be used in the amendment in the same sense in which they had been used in the original statute, unless there is some expression to indicate a contrary intent. Provisions of a prior statute, in so far as they are reproduced in an amendment, are to be construed as a continuation of the provisions of the prior law and not as a new enactment. (*Posadas, Collector,* v. *National City Bank*, 296 U. S. 497, 505; *Anderson* v. *Pacific Coast Steamship Co.*, 225 U. S. 187).

The language of the original statute does not leave any uncertainty or ambiguity concerning the sense in which the term "transportation" was used. It is clear that the term was used to describe the business of those engaged in transporting passengers and in carrying property for others. Used, as the term was, in the Hepburn Amendment in the same connections as it had been used in the original statute, and the Hepburn Amendment having the same general purposes as the original statute, the term should be treated as having the same meaning in the amendment that it had in the original statute.

The term "railroad" was used repeatedly both in the original statute and the Hepburn Amendment. There is

no language in either the original statute or the amendment to suggest that the Congress had in mind any type of railroad operation except railroads engaged in interstate transportation of passengers and in carriage of property for others. In the more than half century that has passed since the original enactment of the statute, and in the legion of cases involving its meaning and application, never, so far as Appellee is advised, has it been held that it applies to any character of railroad except railroads engaged in business as common carriers for hire, and the fourth and fifth paragraphs of section 1 of the Act show that it was directed at these railroads and none other.

This court has expressly held that the Act does not apply to a private, interstate railroad engaged in transporting only the property of the owner of the railroad. (*Pennsylvania Railroad Company* v. *Public Utilities Commission of Ohio*, 298 U. S. 170.)

In the Hepburn Amendment, interstate transportation of oil by pipe line was brought into the Interstate Commerce Act. In the very clause which so extended the Act it was provided that the Act should apply to "persons engaged in transportation of oil * * * by means of pipe lines, or partly by pipe lines and partly by railroad." The term "railroad" was evidently used in that clause in the same sense in which it was used in other clauses in the original statute and in other clauses in the Hepburn Amendment; that is, as descriptive of railroads engaged in carriage of property for others. Certainly the Congress did not intend in this same clause to refer to pipe lines used exclusively by the owner thereof to move such owner's oil as an incident to another business, and to tie that movement to a further transportation of the oil by common carrier railroad. Congress was speaking of transportation of oil by pipe line carrier engaged in carriage for others and of that type of transportation connected with further transportation by common carrier railroad.

(c) The Amendment of 1920 to the Interstate Commerce Act

In the Amendment of 1920 (41 Stat. 474-478, see Appendix, pages 73-76) there was some change in the language of section 1 of the Interstate Commerce Act, as amended by the Hepburn Amendment (34 Stat. 584; see Appendix, pages 70-73), but this Court has held there was no change in meaning.

In the following quotation from section 1 of the Act, as amended in 1920, the language which was carried forward from the Hepburn Amendment is italicized:

> "(1) *That the provisions of this Act shall apply to* common carriers *engaged* in—
>
> (a) *The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;* or
>
> (b) *The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or*
>
> (c) The transmission of intelligence by wire or wireless:— • • •
>
> (2) • • •
>
> (3) The term 'common carrier' as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies, sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this Act it shall be held to mean 'common carrier.'"

Consistent with the above-stated rules of construction, the Court, in *Valvoline Oil Company* v. *United States et al.*, 308 U. S. 141, 145, in speaking of the change of language in the Amendment of 1920, said: "In the present Act there is a change of language, but we perceive none in meaning."

The term "transportation," then, when used in the 1920 Amendment, has the same meaning as it had when it was used in the original Act and in the Hepburn Amendment.

If there was ever any uncertainty concerning the meaning of the term "transportation," as used in the Interstate Commerce Act as originally enacted and as amended in 1906 and in 1920, the meaning of the term has been made certain by the opinions of the Supreme Court. The following opinions warrant the statement that the term "transportation" refers to and is descriptive only of interstate carriage by persons engaged as carriers for others.

(1) *The Pipe Line Cases*

The holding in *The Pipe Line Cases*, 234 U. S. 548, that the Hepburn Amendment brought within the reach of the Interstate Commerce Act the pipe line operations of the Standard Oil Company and its affiliates, but not the operations of the Uncle Sam Oil Company, was founded upon the conclusion that the "transportation" by the Standard Oil Company and its affiliates was for others, while the exception of the Uncle Sam Oil Company from the order reversing the decree of the Commerce Court (*Prairie Oil and Gas Company* v. *United States*, 204 Fed. 798) was founded upon the fact that the "transportation" by that company, while interstate in character, was of the oil of the owner of the pipe line.

The opinion in the *Pipe Line Cases* and the current history make clear that the Hepburn Amendment was directed at the pipe line operations of the Standard Oil Company and its affiliate. They had control of the only practical means of oil transportation between the Rocky Mountains and the Atlantic seaboard. They made use of their monopoly of this means of transportation to refuse to carry oil through their pipe lines unless the producers of the oil would sell their oil to the pipe line owners at the latter's price. They carried "everybody's oil," although they compelled "outsiders to sell it before taking it into their pipes." The operations of these companies were found to

be such that the companies were "common carriers now in everything but form." In substance and effect, they were furnishing a means of transportation for others. They were "not technically common carriers yet (they) were carrying all oil offered, if only the offerers would sell at their price." They were common carriers in substance and the Court held that the Congress had power to require them to become common carriers in form (234 U. S. 561).

The Uncle Sam Oil Company's pipe line was used exclusively to transport the oil of that company from its wells in one state to its refinery in another state. The product "when reduced at the refinery passes into the markets of consumption." (Chief Justice White's concurring opinion, 234 U. S. 562). The question presented as to that company was whether or not such a pipe line operation was "transportation" within the meaning of the term as used in the Hepburn Amendment. On this subject the Court, speaking through Mr. Justice Holmes, said (234 U. S. 562).

> "It would be a perversion of language, considering the sense in which it is used in the statute, to say that a man was engaged in the transportation of water whenever he pumped a pail of water from his well to his house. So as to oil. When, as in this case, a company is simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all, *we do not regard it as falling within the description of the Act*, the transportation being merely an incident to use at the end." (Italics ours)

Chief Justice White did not agree with the majority in the conclusion that the Uncle Sam Oil Company's pipe line operations did not constitute "transportation" within the meaning of the statute, but based his concurrence in the holding as to that company on the ground that "it would be impossible to make the statute applicable to it (Uncle Sam Oil Company) without violating the Due Process Clause of the Fifth Amendment, since to apply it would necessarily amount to a taking of the property of the company without compensation" (234 U. S. 563).

It does not make any difference whether the view of the majority or the view of the Chief Justice is accepted, for the effect of each is that the Hepburn Amendment did not bring within the reach of the Interstate Commerce Act a pipe line used exclusively in moving the oil of the pipe line owner from one state to another as an incident to the pipe line owner's business of producing and refining crude petroleum and marketing the refined products thereof,—and that is the business that Appellee conducts. It is not important which view is accepted; the view of the majority was that the Hepburn Amendment was not intended to reach a private pipe line used only by its owner; the view of the Chief Justice was that the private line was not reached because to so construe the statute would be to bring it in conflict with the Fifth Amendment. Both views reach the same end,—private carriage is not covered.

(2) *The Valvoline Case*

Valvoline Oil Company v. *United States, et al.*, 308 U. S. 141, is the only case involving pipe line transportation which has been decided by the Supreme Court under the Interstate Commerce Act, as amended in 1920, except the prior *Champlin* case. Valvoline Oil Company was engaged in operating 1,426 miles of pipe line connected with 9,020 wells in Pennsylvania, Ohio and West Virginia. It purchased oil at the wells from the well owners, using a part of it to manufacture products sold by Valvoline and selling a part of it to other refiners in Pennsylvania and West Virginia. However, none of the oil so sold to others was produced outside of the state in which the purchasing refiners were located. Valvoline said in its brief in the Supreme Court that the wells served by its pipe line were "stripper wells scattered over Western Pennsylvania, West Virginia and a small part of Ohio," and that "these wells are so small that common carriers cannot afford to construct, maintain and operate lines for transportation of oil in such small quantities". In those words Valvoline

admitted itself out of Court. The inference to be drawn from them was that, as to wells served by its pipe line, Valvoline had a monopoly of the only practical means of transportation, as had been true of the Standard Oil Company and its affiliates in *The Pipe Line Cases*. Valvoline was engaged in purchasing oil from many sources and transporting it by pipe line. The facts in respect to Valvoline's pipe line operations in their essentials were like the facts in respect to the pipe line operations of the Standard Oil Company and affiliates in *The Pipe Line Cases*. The only difference was one of degree, which was regarded by this Court as "immaterial" (308 U. S. 147). In holding Valvoline under the Act, this Court said "* * * *it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline.*" The carriage by Valvoline, like the carriage by the Standard Oil Company and its affiliates, was in substance and effect for others; and was, therefore, transportation within the meaning of the Act.

In the *Valvoline* case this Court approved the holding in *The Pipe Line Cases* as to the pipe line operations of the Uncle Sam Oil Company, saying (308 U. S. 146): "This was held not to be transportation under the Act."

The *Valvoline Case* was decided upon the same principles upon which it had been held in *The Pipe Line Cases* that the pipe line operations of the Standard Oil Company and its affiliates were under the Act. In both instances the carriage involved was in substance and effect carriage of all oil offered, if only the owner would sell to the pipe line.

(3) *The Pennsylvania Railroad Company Case*

In *Pennsylvania Railroad Company* v. *Public Utilities Commission of Ohio*, 298 U. S. 170, the issue was whether intrastate rates applied to switching and delivering four carloads of coal in Youngstown, Ohio, or whether the charge should be based on the interstate rates from the mines to the point of delivery. Pittsburgh Coal Company operated

coal mines in Pennsylvania and by means of its private barges and privately owned and operated railroad moved the coal from its mines in Pennsylvania to its cleaning and sizing plant near Negley, Ohio. After being cleaned and sized at the plant near Negley, Ohio, the cars of coal were shipped by common carrier for delivery to consignees in Youngstown, Ohio. Up to the sizing plant the carriage was solely by the Pittsburgh Coal Company's own facilities, but it was an interstate movement and the coal was on the way to market. The Pennsylvania Railroad Company and the Erie Railroad Company contended that the local or intrastate rates for switching and delivering cars in Youngstown should not be applied for that service, but that the charge should be made upon the basis of interstate rates from mines to destination. The Court, speaking through Mr. Justice Cardozo, said (298 U. S. 175):

> "The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold that this interstate transportation by an owner who does not carry for anyone else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process."

In illustrating the consequence of such a construction of the Interstate Commerce Act, as appellants urged in that case, the Court further said (298 U. S. 176-177):

> "The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from

> Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress."

In that case this Court made clear that the term "transportation" as used in section 1 of the Interstate Commerce Act as it exists today means transportation by persons engaged as carriers for others, and that it does not include the movement of property from one state to another by the owner through the use of his own railroad or pipe line. The Court also made clear that even though such private transportation by an owner of his property or products is *for the purpose of reaching markets, nevertheless* the movement is not "transportation" within the meaning of the Interstate Commerce Act.

Elsewhere in the opinion, this Court gave further evidence of its conviction that the Act is not directed at an owner's interstate movement of his own property or products by his own private means. The Court said (298 U. S. 174):

> "The Interstate Commerce Act (49 U. S. C. Sec. 1 et seq.) *is aimed at common carriers exclusively*, sec. 1 (1), (3), and not even at all these." (Italics ours)

The cases compel the conclusion that Appellee's pipe line operations are not "transportation" within the meaning of the Act. In the cases cited and discussed above, this Court impressed upon the term "transportation" as used in the Interstate Commerce Act the meaning of carriage between states of passengers and property for others. Stability of judicial decision argues strongly, if it does not demand, that a meaning which has stood so long should not now be changed unless the former holdings can be shown clearly to be wrong.

Appellants point out that in *The Pipe Line Cases* and the *Valvoline* case the pipe line operators were carrying only their own oil, and say that the statute clearly applied to "companies such as those which, prior to the legislative Act, had refused to carry oil for others". (Br. 23, 24, 25, 26, 27) And, thus they argue that the statute was intended to apply; and applies under the decisions of this Court, to those who carry only their own oil. This argument completely leaps over the bases upon which the Standard Oil Company and its affiliates and the Valvoline Company were held under the Act.

(d) The fact that Appellee uses its pipe line to move its products to market does not bring such operations within the meaning of the term "transportation" as used in the act

Appellants argue that since Appellee is moving its products to market, the pipe line operation is subject to the Act. They point out that such was the end served by the lines of Standard Oil Company and its affiliates in *The Pipe Line Cases*, and say that Congress brought pipe lines under the Act to make the low cost means of transportation available to others than the pipe line owners; that the purpose of the pipe line provisions of the Act was to bar pipe line owners of a monopoly of their means of transportation (Br., 28). Appellee does not have a monopoly of means of transportation or of markets (R. 45-47).

This Court has had opportunity to say that such a fact would justify calling upon a pipe line owner to become a common carrier for hire and also to give the fact of movement to market significant importance in determining that the pipe line is under the Act. It has never made the fact of movement to market a cause either to justify calling upon a pipe line to act as a common carrier for hire or to hold a pipe line operation under the Act.

The Uncle Sam Oil Company's pipe line was used to move its oil from its wells to its refinery, "and the product of course when reduced at the refinery passes (passed)

into the markets of consumption". (Concurring opinion of Chief Justice White, 234 U. S. 562)

Certainly, there is no such difference between the movement of oil from field to refinery by means of a private pipe line as a step toward marketing products, and the movement of oil products from refinery to storage near market centers by means of private pipe line as a further step toward marketing the products, as to justify the assumption that Congress did not intend to include the first movement within the terms of the Act, but did intend to include the second movement.

There is an utter absence of language which would suggest that Congress intended the purpose of the movement to be a factor for determining what is "transportation" within the Act and what is "private transportation" not within the Act. The Standard Oil Company and its affiliates and Valvoline Oil Company were engaged in moving oil from the fields to refineries with a view that the refined products would reach the markets. The Uncle Sam Oil Company was moving its crude oil for the ultimate purpose of selling the products thereof. (See concurring opinion Chief Justice White in *The Pipe Line Cases.*) The operations of the Standard Oil Company and its affiliates and of the Valvoline Oil Company were held under the Act, the operations of the Uncle Sam Oil Company were held not within the reach of the Act, yet each was engaged in moving oil with the ultimate view of marketing the refined products. The fact that the oil was being moved toward market apparently was not a factor in determining the applicability of the Act to any of these companies.

In the *Valvoline* case this Court, in speaking of the operations of the Standard Oil Company and its affiliates, said (308 U. S. 144, 145):

> * * * "Whether the oil so owned and transported was ultimately used by the carrier in its own operations *or sold to others was in this connection immaterial.*" (Italics ours)

Again, the Pittsburgh Coal Company was using its facilities to move its coal "to market for sale to the public," but that fact was not sufficient to bring its operations within the coverage of the Interstate Commerce Act.

Thus it appears that the fact of movement of a commodity to market is not a factor in determining the applicability of the statute.

Obviously the purpose of the Interstate Commerce Act is to regulate the transportation business of those who enter into engagements to transport property for others or to transport passengers, to reach and regulate the transportation business of those who sustain toward others the relation of carrier of property to shipper, or of carrier to passenger. That such is the purpose and object of the Act is clear from the language in which it is cast. The movement of property or products to market by means of railroad or pipe line, standing alone, is not sufficient to bring the movement within the meaning of the term "transportation" as used in the Act. The element of carriage for others is essential to the "transportation" covered by the Act.

Appellee's pipe line is used only for the transportation of refined products. Obviously no one can have any interest in such products that would call for regulation of the pipe line or the posting of rates and charges.

(e) The Interstate Commerce Act does not have the effect to make all interstate pipe lines common carriers under the Act

Appellants speak of the all inclusiveness of the term "all pipe line companies." (Br., 23) Appellants would give the words a literal meaning.

To construe the Interstate Commerce Act to make common carriers of all interstate pipe lines, would be (1) to give the Act a breadth of meaning and effect which this Court has three times refused to give it; (2) to fail to take into account the sense in which the term "transportation" is used in the Act; and (3) to neglect to give proper con-

sideration to the limitations which the Fifth Amendment imposes on the power of Congress to take private property for a public use.

In *The Pipe Line Cases*, 234 U. S. 548, and in the *Valvoline case*, 308 U. S. 141, the United States and the Interstate Commerce Commission urged the Court to hold that the Act makes common carriers of all interstate pipe lines.

In the opening sentence upon the first point in the brief for the United States in *The Pipe Line Cases* it was contended that:

> "Congress deliberately intended the act to apply to every interstate pipe line. It intended to compel every interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce. Whether any particular pipe line had or had not been a common carrier prior to the passage of the act is wholly immaterial."

The foregoing contention of the Government is stated in the summary of briefs in *The Pipe Line Cases* (234 U. S. 549) as follows:

> * * * "Congress intended the Act to apply to every interstate oil-carrying pipe line and to compel every such interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce."

In *Prairie Oil & Gas Co.* v. *United States*, 204 Fed. 798, the Commerce Court held that the Hepburn Amendment had the effect to make all interstate pipe lines common carriers. In holding that the operations of the Uncle Sam Oil Company were not within the coverage of the Act, this Court overruled such holding of the Commerce Court and rejected the Government's contention that "Congress intended the Act to apply to every interstate oil-carrying pipe line and to compel every such interstate pipe line to become a common carrier as a condition precedent to engaging in interstate commerce."

When Mr. Justice Holmes in writing his opinion in *The Pipe Line Cases* came to the problem of determining the limits of the Hepburn Amendment as it related to pipe lines, he had before him as litigants a company whose pipe line operations were strictly private in nature and other companies which were in point of fact monopolizing the only practical means of transporting oil to market and were making use of their monopoly of this means of transportation to force producers to sell their oil to the pipe lines. He could find in the operations of these latter companies not only the semblance but the substance of common carriers. They were carrying all oil to market if the owners would sell to them. In reality, these companies were furnishing to others a means of transportation. He was able to find in the Commerce Clause power to compel those who were common carriers in substance to become so in form; and in the words of the Act he was able to find that Congress had adopted the Hepburn Amendment with just such an intent; but he was not able to find in the Act any intent upon the part of Congress to compel private carriers to become common carriers.

Certainly if the facts with respect to the operations of Standard Oil Company and its affiliates are taken as the measure of what is a common carrier "in substance" then none can say that Appellee is a common carrier in substance.

In the *Valvoline* case the United States and the Interstate Commerce Commission urged that "since Valvoline is a pipe line company engaged in the interstate transportation of oil, it comes directly within the statutory definition;" and again that "The fact that Valvoline is a pipe line company is determinative of the fact that it is a common carrier within the meaning of the Act." This Court did not accept the argument, but held that "It is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline" (308 U. S. 146). The Court declined to dispose of the *Valvoline*

case upon a simpler basis, urged by the Government and Interstate Commerce Commission. Valvoline was held subject to the Act because it was engaged in "transportation" within the meaning of the Act.

While the Amendment of 1920, involved in the *Valvoline* case, made certain changes in the language of the Hepburn Amendment, involved in *The Pipe Line Cases*, there was no change in the Act to broaden its meaning or reach as applied to pipe lines. This appears not only from the statement of the Supreme Court (308 U. S. 145) but also from the fact that the pipe line operations of Valvoline were held subject to the Act as amended in 1920 upon substantially the same fact bases as the Standard Oil Company and its affiliates had been held subject to the Hepburn Amendment in the earlier case.

If the Supreme Court had considered tenable the contentions of the Government in *The Pipe Line Cases* with respect to the meaning and purpose of the Act, the Uncle Sam Oil Company's pipe line operations could not have been held to be beyond the reach of the Act. If the above stated contention, urged by the Government in the *Valvoline* case, had been considered sound, it would not have been necessary to base the holding that Valvoline's operations were within the reach of the Act upon the statement that, * * * "it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline." The fact that these contentions were rejected in those cases coupled with the statement in the *Valvoline* case (308 U. S. 145) that the meaning of the Act was not changed by the 1920 Amendment, compels the conclusion that the language of the 1920 Amendment is not any broader or more inclusive than the language of the Hepburn Amendment, and demonstrates that it does not represent an attempt by legislative act to include all interstate pipe lines.

In the brief for the United States and the Interstate Commerce Commission filed in this Court in the prior

Champlin case, the following statement was made (Brief, 8):

> "The words of Section 1(1) and (3), its legislative history, and the authoritative construction put upon these provisions by this court make it abundantly clear that appellant, being a pipe line company 'engaged in the transportation of oil or other commodity,' is a common carrier within the meaning of the Interstate Commerce Act, as amended, and, even if not a common carrier in the common law sense, may be required to forward the information sought by the order here entered pursuant to Section 19a."

Thus for a third time the Supreme Court was urged by the Government to hold that section 1(1) and (3) of the Interstate Commerce Act brings all interstate oil pipe lines under the Act. The Supreme Court did not so hold in either of the three cases and it could have made short shift of each of them if it had been willing to accept the contention of Government counsel. And, in the prior Champlin case Mr. Justice Reed observed that "the *Pipe Line* and *Valvoline* cases did not bring within the scope of the Interstate Commerce Act all pipe lines that carried oil interstate."

(f) The Act deals only with such as are "common carriers" in fact, and does not purport by use of the term "all pipe line companies" to impose upon private carriers the burdens of common carriers

The Interstate Commerce Act proposed to correct existing evils by requiring the carriers at which it was directed to furnish transportation at reasonable rates upon reasonable demand; and, to make the proposed remedy effective, Congress required the filing and publishing of rates and charges, prohibited rebates and other discriminations, and prescribed penalties for violation of the requirements and prohibitions of the Act. No such evils as those against which the Act was directed could exist as to private carriers.

The terms "all pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies; sleeping car companies" as used in the definition of the term "common carriers" in the 1920 Amendment, should be considered in the light of the over-all purpose of the Act and the express declaration that "The provisions of this Act shall apply to common carriers***." They should also be considered in the light of the meaning in which the terms "transportation" and "transmission" are used in the Act. The first sentence of section 1, declaring that the provisions of the Act shall apply to "common carriers" engaged in the "transportation" of passengers or property, or in the "transmission" of intelligence, evidently refers to "transportation" and "transmission" for others than the carrier, — transportation and transmission service rendered by common carriers. The terms first quoted were evidently used in their generally accepted and ordinarily understood meaning to describe and bring within the reach of the Act any company whose business is that of an interstate carrier engaged in the character of transportation or transmission ordinarily conducted by companies of one or the other of the named classes, — companies engaged as common carriers in interstate transportation of passengers or in interstate transportation of property for others or in interstate transmission of intelligence for others. The "transportation" of passengers is necessarily a carriage for others than the carrier. Certainly the term "transportation" was not used in one sense when referring to the "transportation" of passengers and in another sense when referring to the "transportation" of property.

In defining "common carrier" to include "all pipe line companies; telegraph, telephone, and cable companies operating by wire or wireless; ***" Congress evidently had in mind companies engaged in interstate "transportation" within the meaning of the term as used in the Act. So understood, the term would refer only to companies engaged

in business as common carriers in "the transportation of oil *** by pipe line ***; or the transmission of intelligence by wire or wireless ***." In the *Pennsylvania Railroad Company* case (298 U. S. 170, 174), this Court, citing the section of the Act in which the terms now under consideration were used, said, as we have heretofore stated, that "The Interstate Commerce Act (49 U. S. C., Sec. 1 *et seq.*) is aimed at common carriers exclusively, Sec. 1(1), (3), and not even at all these." Only if the term, "all pipe line companies" is given the interpretation Appellee advances, could that statement of this Court stand as a true interpretation of the Act. Conversely, the interpretation heretofore urged by the Government and adopted by the Commission cannot stand if the Act "is aimed at common carriers exclusively", as was said by Mr. Justice Cardozo.

The terms "all pipe line companies; telegraph, telephone and cable companies operating by wire or wireless; express companies; sleeping car companies," all used in the Act, have well understood meanings. The term "all pipe line companies" is descriptive of companies engaged as common carriers in transporting oil by means of pipe line. It does not include a company owning purely private lines, limited in use to some other business or incidental to the business of the owner. (*State Tax Commission vs. Petroleum Exploration,* 68 S. W. (2d) 777, 779; *Texas Company vs. Stephens,* 100 Tex. 628, 103 S. W. 481; *Col-Tex Refining Company vs. Hart,* 144 S. W. (2d) 909; *United States vs. Northwestern Ohio Natural Gas Company,* 141 F. 198; *Judson on Intersiate Commerce,* Sec. 136, p. 220, Second Edition).

The term "telegraph" companies is descriptive of companies engaged as common carriers in transmitting intelligence. It does not include a railroad operating telegraph lines for the safe and expeditious movement of its trains, but not for use by the public. (*Adams vs. Louisville N. O. & T. RR. Co.* (Miss.), 13 So. 932). In the Post Roads Act (14 Stat. 221, 47 U. S. C. 1) Congress used the term "tele-

graph company", and provided that such a company might construct lines over the public domain and along military or post roads. Later another statute (21 Stat. 31, 47 U. S. C. 7) was enacted extending the benefits of the former statute to railroads that operated telegraph lines. Evidently it was thought that the term "telegraph company" used in the original statute, did not include a railroad that operated telegraph lines.

The term "telephone" companies is descriptive of companies engaged as common carriers in supplying telephone service for others. It does not include a non-profit association which maintains a telephone system for the convenience and use of its owners only. (*People ex rel. Knowlton vs. Orange County Farmers & Merchants Assn.* (Cal.), 204 Pac. 873)

The term "express" companies is descriptive of companies engaged in the business of transporting parcels or other movable property in the capacity of a common carrier. (*American Ry. Express Co. vs. Wright* (Miss.), 91 So. 342) It does not include forwarding companies who collect, consolidate, ship and distribute less than carload lots of freight and express shipments. (*Acme Fast Freight, Inc., et al. vs. United States, et al.*, 30 F. Supp. 968, affirmed, *Acme Fast Freight, Inc., et al. vs. United States, et al.*, 309 U. S. 638)

Similarly, an oil company operating a line of railroad extending into its refinery is not a railroad corporation (*Humble Oil & Refining Co. vs. Hamer*, 167 S. W. (2d) 272); a lumber company operating a private railroad as an incident to its business is not a railroad company (*Sisk vs. White Oak Lbr. Co.* (Dist. Ct.), 14 Fed. (2d) 552; *Taenzer vs. Chicago, R. I. & P. RR. Co.*, 170 Fed. 240, 249); a steel company operating tracks and switch engines for use in switching freight cars is not a railroad company (*Taggart vs. Republic Iron & Steel Co.*, 141 Fed. 910); a lumber company operating a logging railroad is not subject to a statute directed against railroad companies (*Crowley*

vs. Polleys Lbr. Co., 9 Pac. (2d) 1068); a company doing a mortgage loan business, which writes title insurance as an incident thereto, is not an "insurance company" (*Bowers vs. Lawyers Mtg. Co.*, 285 U. S. 182).

It would do violence to the general purpose of the Act if it were held that the above terms were used to include corporations which operate pipe lines, telegraph lines, or telephone lines as an incident to another business, and which do not make the service available to others than the owners.

It is a matter of common knowledge that many pipe line companies and railroad companies construct along their rights-of-way telegraph or telephone lines and use them exclusively in transmitting messages necessary to the efficient operation of their properties. Appellee owns and operates for weather reports, maintenance of the pipe line and transmission of orders and directions, such type of telephone line from Enid to Rock Rapids. Is Appellee a telephone company, under the 1920 Amendment, and can it be compelled to open such telephone line to the use of the public in the transmission of messages? Obviously the Congress, in naming telephone companies in the definition of "common carriers", did not intend to include, as such, an oil refinery company which operates a private telephone line in the operation of its marketing business; and, by the same reasoning, Appellee cannot be said to be a "pipe line company" because of its operation of a private pipe line as a refinery facility.

It seems clear that the term "all pipe line companies" was used in the 1920 Amendment to describe companies whose principal business is that of acting as common carriers in the interstate transportation of oil by pipe line; that the term "telegraph companies" was used to describe companies whose principal business is that of acting as common carriers in the interstate transmission of intelligence; and that the term "telephone companies" was used to describe companies whose principal business is that of acting as common carriers in the interstate transmission of intelligence.

When the quoted terms are so understood, the interpretation of the Act conforms to its plainly dominant purpose and Appellee's pipe line operations are not within the Act.

The concluding clause of the first sentence of paragraph (3) of section 1 of the Act, "and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid, as common carriers for hire", does not limit the generality of the next preceding clause naming certain classes of companies, but adds individuals to the classes of companies so named and also adds corporations which, though not engaged principally in business as common carriers, do as a part of their business engage "in such transportation or transmission as aforesaid as common carriers for hire." They are not strictly speaking pipe line companies or telegraph companies, but if, as a part of their business, they engage as common carriers by pipe line or by telegraph wire, they are brought under the Act by the last clause of paragraph (3).

If Congress had intended by the terms "all pipe line companies, telegraph, telephone and cable companies operating by wire or wireless" to include all persons and corporations engaged in operating pipe lines, telephone or telegraph lines which cross state lines the concluding clause of the statutory definition of "common carrier" would have been a purposeless use of words, in so far as pipe line operations were concerned.

The fact that in the concluding clause Congress used the term "all persons, natural or artificial" demonstrates that Congress recognized that not all owners of interstate pipe lines are "pipe line companies". The term "pipe line company" would not, if treated in its ordinary meaning, include a company whose principal business is not that of a common carrier in interstate transportation of oil by pipe line, but which does, as a part of its business, engage in such transportation as a common carrier. Therefore, additional language was necessary to reach individuals and also to reach companies of the latter description. This was

accomplished by the use of the concluding clause of the definition, namely, "and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire". But the Act applies to such persons or companies only if their operations are conducted "for hire". So interpreted the statute does not include Appellee.

The last clause of the definition pointed out above evidently was intended to bring within the operation of the Act individuals and companies whose principal business is not "such transportation or transmission as aforesaid as common carriers for hire". The term "such transportation or transmission as aforesaid" evidently referred to "the transportation of passengers or property *** by railroad; or the transportation of oil *** by pipe line ***; or the transmission of intelligence by wire or wireless", by common carrier, as used in section 1 of the Act.

Such construction preserved the dominant purpose of the Act, — to reach persons and companies engaged in interstate transportation for the public, to require them to render adequate service at reasonable rates, to prohibit discrimination, rebating and other abuses. So construed, the exception to the Uncle Sam Oil Company in *The Pipe Line Cases*, in the light of the statement in the *Valvoline* case that the amendment did not change the meaning of the original Act, is justified. The statement in the *Valvoline* case that the last clause of sub-section (3) "and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire" is a "conjunctive not a modifier" and does not affect the generality of the first clause, is then given its obviously intended meaning.

In 1934 Congress created the Federal Communications Commission (48 Stat. 1064, U. S. C. Title 47, Sec. 152) and therein by sub-paragraph (b) of Section 602 (48 Stat. 1102) provided that:

> "The provisions of the Interstate Commerce Act, as amended, in so far as they relate to communication by wire or wireless, or to telegraph, telephone, or cable

companies operating by wire or wireless, except the last proviso of section 1(5) and the provisions of section 1(7), are hereby repealed."

The effect of this repeal was to delete from the first sentence of sub-paragraph (3) of section 1 of the Interstate Commerce Act, defining the term "common carrier", all reference to telegraph, telephone and cable companies operating by wire or wireless, with the result that the sentence was then made to read as follows:

> "The term 'common carrier' as used in this Act shall include all pipe line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire." (See Title 49, Sec. 1, 1944 pocket parts, U. S. C.)

In the Federal Communications Act (48 Stat. 1066), it was provided that:

> "'Common carrier', or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, in so far as such person is so engaged, be deemed a common carrier."

In Section 201 of the Federal Communications Commission Act (48 Stat. 1070) it was provided that:

> "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor ***."

If Congress had intended in the 1920 Amendment to the Interstate Commerce Act, by the use of the terms "telegraph, telephone, and cable companies operating by wire or wireless," to bring within the regulatory powers of the

Interstate Commerce Commission all companies operating by wire or wireless, without regard to whether they operate as common carrier or not, it does not seem reasonable to suppose that Congress in enacting the Federal Communications Commission Act would have stripped the Interstate Commerce Commission of all power over all such companies and have subjected only such of them as are common carriers for hire to the jurisdiction of the Federal Communications Commission. The fact that Congress did take from the Interstate Commerce Commission jurisdiction over telegraph, telephone and cable companies and give to the Federal Communications Commission jurisdiction over such of them as are common carriers in the common law sense, indicates that Congress considered that the term "telegraph, telephone, and cable companies operating by wire or wireless", as used in the Interstate Commerce Act, was intended to refer only to such companies as are common carriers. Such legislative interpretation is highly persuasive. It follows that, if the term "telegraph, telephone, and cable companies operating by wire or wireless", as used in the definition of "common carrier", in the Interstate Commerce Act, was used to refer only to such of those companies as are common carriers, then the term "all pipe line companies" must have been used in the definition in the same sense; namely, as referring to "pipe line companies" which are common carriers.

Primary business purpose test

In *Brooks Transportation Company, Incorporated, et al., vs. United States of America, Interstate Commerce Commission, et al.*, an appeal from the United States District Court for the Eastern District of Virginia to this Court, No. 517, October term, 1950 (affirmed Feb. 26, 1951) — the question of the right of the Lenoir Chair Company to continue its "business" of transporting *its own manufactured products to its customers in its own motor trucks* upon sales made f.o.b. *its own factories — to which is added*

a charge comparable to the charges of rail or motor common carriers for like service was before a Three Judge Court; Circuit Judge Dobie, for the Three Judge Court, said:

> "The Commission, in deciding that Lenoir and Schenley were *private carriers*, as opposed to *contract carriers* or *common carriers*, applied what is known as the *primary business test*. In other words, if it is established that the *primary business* of a concern *is the manufacture or sale of goods which the owner transports in furtherance of that business* and the *transportation is merely incidental thereto, the carriage of such goods from the factory or other place of business to the customer is private carriage even though a charge for transportation is included in the selling price or is added thereto as a separate item.* (Italics ours)
>
> "The Commission has so held consistently in its interpretations of the statutory provisions regulating the various categories of motor carriers. D. L. Wartena, Inc., Common Carrier Application 4 M.C.C. 619; See, Congoleum-Nairn, Inc., Common Carrier Application, 2 M.C.C. 237; Swanson Contract Carrier Application, 12 M.C.C. 516; Murphy Common Carrier Application, 21 M.C.C. 54; Duli Contract Carrier Application, 32 M.C.C. 158; Woitishek Common Carrier Application, 42 M.C.C. 193.
>
> "In the Woitishek Case (discussed at length in all the briefs before us), the primary business test,' as a criterion for distinguishing between (on the one hand) private carriers and (on the other hand) contract and common carriers, was carefully re-examined and re-analyzed by the Commission, and the conclusion was reached,
>
> "'After careful reconsideration of the entire subject, * * * that we should continue as in the past to determine all issues of for-hire versus private carriage on the basis of the operator's primary business.'"

Champlin's primary business is manufacturing and marketing. Its pipe line operations are merely incidental to its primary business.

So, if Champlin wishes to move gasoline or other petroleum products by motor truck for delivery to its terminals in Iowa, or Nebraska, it is under the decisions of the Commission a private carrier for such operation, but, if it elects to haul the identical products to the identical destinations through a private pipe line, the Government contends it becomes a "common carrier" and such facilities must be so dedicated.

The inconsistency in the Commission's position is utterly indefensible.

WHEREFORE, it is respectfully submitted that the judgment of the lower Court should be in all things affirmed, and Appellee prays for such an order.

Respectfully submitted,

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APPENDIX "A".

Chap. 104—An Act to Regulate Commerce (24 Stat. 379), February 4, 1887.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country or from any place in the United States, through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Section 1 of Hepburn Amendment (34 Stat. 584), June 29, 1906

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad", as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operat-

ing a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, postoffice inspectors, customs inspectors and

immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provisions, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without

discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

Section 1 of the 1920 Amendment to Interstate Commerce Act (41 Stat. 474-478), February 28, 1920.

The first four paragraphs of section 1 of the Interstate Commerce Act, as such paragraphs appear in section 7 of the Commerce Court Act, are hereby amended to read as follows:

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;— from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply —

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(3) The term "common carrier" as used in this Act shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word "carrier" is used in this Act it shall be held to mean "common carrier." The term "railroad" as used in this Act shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term "transportation" as used

in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term "transmission" as used in this Act shall include the transmission of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalities and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable and different rates may be charged for the different classes of messages: And provided further, That nothing in this Act shall be construed to prevent telephone, tele-

graph, and cable companies from entering into contracts with common carriers for the exchange of service.

(6) It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

APPENDIX 'B'

ADDRESS REPLY TO THE ATTORNEY GENERAL AND REFER TO INITIALS AND NUMBER

59-12-425

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON 25, D. C.

FOR VICTORY BUY UNITED STATES WAR BONDS AND STAMPS

May 23, 1947

Harry O. Glasser, Esq.,
Enid, Oklahoma.

Dear Mr. Glasser:

In the case of Champlin Refining Company v. United States the Supreme Court on November 18, 1946 held that the pipeline of Champlin Refining Company was a common carrier under Section 1 of the Interstate Commerce Act and that it was required to comply with the valuation order of the Interstate Commerce Commission. We are advised that on January 8, 1947 the order on the mandate was entered.

Please advise me whether you have filed schedules of rates with the Interstate Commerce Commission in compliance with Section 6 (1) and (7) of the Interstate Commerce Act and Section 1 of the Elkins Act. If not, would you care to state the reasons, if any, why such schedules have not been filed.

Sincerely yours,

JOHN F. SONNETT
Assistant Attorney General